

No. 05-3451

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EUGENE WINKLER, GARY GERSON, TIMUEL BLACK,
MARY CAY MARUBJO, and C. DOUGLAS FERGUSON

Plaintiffs-Appellees,

v.

DONALD H. RUMSFELD, as Secretary of Defense,

Defendant-Appellant.

On Appeal From the United States District Court
for the Northern District of Illinois, No. 1999 C 2424

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF DEFENDANT-APPELLANT**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
ARGUMENT.....	1
THE MILITARY’S SUPPORT FOR THE JAMBOREE DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.....	2
A. The Military’s Support for the Jamboree is Secular, In-Kind Assistance with the Primary Effect of Advancing the Military, Not Religion.....	2
B. The Jamboree Is an Overwhelmingly Secular Event Focused on Outdoor Activities and Patriotic and Civic Virtues, With Only Tangential, Incidental, Religious Components Analogous to the Role of Military Chaplains.....	5
C. The Relationship Between the Military and the Boy Scouts at the Jamboree Is Fundamentally a Value for Value Contract, Which Does Not Amount to an Establishment of Religion.....	10
D. The District Court Erred in Finding that the Military’s Support for the Jamboree Violated the Establishment Clause.....	11
CONCLUSION.....	13

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Agostini v. Felton</i> , 521 U.S. 203, 232 (1997).....	5,11
<i>American Jewish Congress v. Corp. for Nat’l and Community Service</i> , 399 F. 2d 351 (D.C. Cir. 2005).....	10
<i>Christian Science Reading Room v. San Francisco</i> , 784 F.2d 1010 (9 th Cir. 1986).....	10
<i>Comm. For Public Educ. & Religious Liberty v. Regan</i> , 444 U.S. 646 (1980).....	10
<i>Katcoff v. Marsh</i> , 755 F.2d 223 (2d. Cir., 1985).....	7
<i>Rosenberger v. Rector & Visitors of University of Virginia</i> . 515 U.S. 819, 839 (1995).....	9
STATUTES	
10 U.S.C. 2554.....	8,11,13
10 U.S.C. 2667.....	8
10 U.S.C. 2012.....	8,9
OTHERS	
Joint Ethics Regulation, DOD 5500.7, Sect. 30211.....	8
http://www.gpoaccess.gov/usbudget/fy06/sheets/budauth.xls	9

INTEREST OF AMICUS CURIAE¹

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard Professor James Q. Wilson, Walter Williams, Professor of Economics at George Mason University, former Ambassador to Costa Rica Curtin Winsor, Jr., L. Clayburn LaForce, Dean Emeritus of the Anderson School of Business at UCLA, and nationally syndicated columnist Joseph Perkins.

This is exactly the kind of case that is of interest to the ACRU because we want to ensure that the constitutional rights of the Boy Scouts are protected, and not overlooked because of ideological bias.

All parties have consented to the filing of this brief.

ARGUMENT

Amicus Curiae American Civil Rights Union (ACRU) agrees completely with the argument of the Justice Department that the Plaintiffs do not have taxpayer standing to bring the claims in this action. But we have nothing new to add to that argument. We do believe, however, that we can contribute useful new analysis to the Establishment Clause issues, as discussed below.

¹ The American Civil Rights Union is a non-profit, 501(c)(3) corporation with no stock

I. THE MILITARY’S SUPPORT FOR THE JAMBOREE DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

The military’s support for the Jamboree is purely secular, in-kind assistance directed to the Jamboree as a whole, and not to any religious component of the event in particular. Indeed, that military support is expressly designed to advance the interests of the military, not religion. Moreover, the Jamboree is predominantly secular, focusing on boy-oriented outdoor activities, and civic and military virtues. The role of religion in the Jamboree is tangential and analogous to the role of chaplains in the military itself. Consequently, the **primary** effect of the military’s support for the Jamboree cannot be to advance religion. Rather, the primary effect is to advance the interests of the military.

A. The Military’s Support for the Jamboree is Secular, In-Kind Assistance with the Primary Effect of Advancing the Military, Not Religion.

The Justice Department brief and the brief *amicus curiae* of the Boy Scouts of America thoroughly recount what the record shows regarding the military’s support for the Jamboree. The military loans the Scouts equipment for use at the Jamboree, such as tents, blankets, tables, refrigeration devices, motor vehicles and communication equipment. Irizarry Decl. (Sep. App. 68 et seq). The military assists with auxiliary support services such as security, emergency medical services, communications, and logistical support. *Id.* The military also performs ceremonial functions and pro military public relations activities such as performances by military bands, flag teams, color guards, and drill teams, as well as exhibits, displays, showcased equipment, aircraft flyovers, and souvenirs promoting military service. *Id.* Finally, the military provides infrastructure for the Jamboree area, such as a campsite and land for Jamboree activities;

and no parent or other affiliate corporations.

maintained water, sewer and road systems; and erection of shower and latrine facilities.
Id.

The total sum of military support for the Jamboree is encompassed in this in-kind assistance. The military provides no funds to the Scouts for the Jamboree. Irizarry Decl., para. 14 (Sep. App. 71).

Moreover, established Defense Department policy explicitly states that any and all funds spent on the Jamboree must have a military benefit, and no funds may be spent solely to benefit the Boy Scouts. Irizarry Decl., para. 15 (Sep. App. 72). The Jamboree provides major benefits for the military. It is an important public relations event to promote the military not only to the 40,000 Scouts who regularly attend, but to the quarter million additional supporters and visitors who usually attend, as well as to the general public through media coverage. Irizarry Decl., para. 17 (Sep. App. 71).

The Jamboree also provides a major recruiting opportunity for the military. Military activities at the Jamboree are focused on promoting the military to the 40,000 Scouts who regularly attend, particularly fertile ground for recruitment given the values of patriotism and civic duty Scouting has taught them. Irizarry Decl., paras. 18-19 (Sep. App. 72-73) (Military support for Jamboree serves “the recruitment related objective of promoting the military to a large gathering of America’s youth and showcasing the exciting careers that the military offers.” *Id* at para. 19, (Sep. App. 73). That is the point of all the military bands, drill teams, color guards, exhibits, displays, showcased equipment, and flyovers.

The military also uses the Jamboree for training of its military personnel. Training personnel are deployed to carry out tasks and responsibilities directly related to

their unit missions, such as rapid construction, maintenance and then disassembly of a tent city serving hundreds of thousands of Jamboree scouts, support staff, and visitors. Communications specialists train to install and operate telephone and wireless communications systems to serve such a major, military force size camp. Medical units, logistics and military supply units, even media and public relations personnel also train to serve a camp, operation, and event of this size. Irizarry Decl., para. 21 (Sep. App. 74-75). Indeed, the preponderance of this support is provided by reserve units performing their annual training, financed by their regular training budgets. Irizarry Decl., para. 22 (Sep. App. 75).

Finally, the military uses the quadrennially recurring Jamboree at Fort A.P. Hill to make permanent “dual use” infrastructure improvements that will serve the long term military functions at that facility, as well as the shorter term Jamborees. Construction of access roads, replacement of well and sewer lines, building of lasting shower and latrine facilities, and other activities, expand the capacity of the military installation there.² They also provide an excess surge capacity that makes the facility a better military emergency response and deployment location, a function that was used at Fort A.P. Hill after September 11, for example. Irizarry Decl., para. 23 (Sep. App. 75-76). The Boy Scouts themselves contribute to these infrastructure improvements in return for their use by the Jamboree. These contributions have totaled \$5.6 million to \$8.4 million since 1981. Irizarry Decl., para. 25 (Sep. App. 77).

² A couple of more minor examples include the Army’s construction of four obstacle courses for the 1997 Jamboree using materials provided by the Boy Scouts. The courses were built to military training specifications and have been used to train soldiers since that time. Irizarry Decl. Para. 23 (SA 75-76). Water quality testing of ponds, lakes and streams on the fort property and nearby is done every four years for the Jamboree

All of the military support for the Jamboree falls into these categories, and, again, as a matter of express policy, serves to benefit the military. Indeed, contrary to the plain error of the court below, this support is based precisely on “criteria that neither favor nor disfavor religion,” *Agostini v. Felton*, 521 U.S. 203, 232 (1997), the criterion being whether the support advances the interests of the military. Moreover, all of this military support is secular, in-kind assistance directed to the Jamboree as a whole, and not to any religious component of the event in particular. Transparently, therefore, the **primary** effect of this support is not to advance religion, but, rather, to advance the interests of the military. Consequently, the support cannot amount to an establishment of religion.

B. The Jamboree Is an Overwhelmingly Secular Event Focused on Outdoor Activities and Patriotic and Civic Virtues, With Only Tangential, Incidental, Religious Components Analogous to the Role of Military Chaplains.

The brief *amicus curiae* of the Boy Scouts of America and the Justice Dept. brief thoroughly review what the record shows regarding the nature and activities of the quadrennial Boy Scout Jamboree. The central area of the 2005 Jamboree included an Army Adventure Area, the Outdoor Adventure Place, the Merit Badge Midway, the American Indian Village, the Radio Station, Exhibits and Displays, Action Centers, and Outback Centers labeled the Kayak, Boating, Scuba & Snorkel, and Fishing Areas. These areas focus on Scouting activities such as archery, air rifle shooting, motocross, mountain biking, buckskin games, rappelling, trapshooting, water sports, fishing, scuba diving, snorkeling, canoeing, kayaking, rafting, sailing, conservation, ecology, history, civics, physical fitness, and others.

that also serves the purposes of the continuing military use of the facility. *Id.* para. 24 (Sep. App. 76).

The Army Adventure Area and Exhibits and Displays are areas where the military promotes itself to the boys. In the Merit Badge Midway, Scouts work to earn some of the 70 different merit badges from art and basketry, to camping and hiking, emergency preparedness and lifesaving, geology and weather, space exploration and railroading, journalism and public speaking, and 3 different citizenship badges required to become an Eagle Scout. Interestingly, there are no merit badges for religion or any religious activity.

The 2001 Jamboree featured an Arts and Sciences Expo exhibiting Scout submissions in photography, painting, sculpture, literature and science projects. The 1993 Jamboree included exhibits from 15 different government agencies ranging from conservation to health and safety. A 2005 police exhibit focused on drunk driving, with Scouts donning goggles to simulate vision with an excessive blood alcohol level.

The Jamboree was first held on the Mall in Washington, DC. in 1937. It has been addressed over the years by Presidents Roosevelt, Truman, Eisenhower, Nixon, the first and second Bush, and Clinton, as well as Nancy Reagan and numerous Congressmen and Senators. Patriotism is always a central theme of the Jamboree.

Religion has a proper but tangential and incidental role in the Jamboree. In the 1997 Jamboree, 2 out of 195 exhibits and displays were sponsored by religious organizations. In the 2001 Jamboree, only one tent out of 200 exhibits involved religion. Smith Supp. Decl. Paras. 20-21, 25. (Sep. App. 36-37). Scouts can earn a religious emblem by completing a program offered by these religious outlets. But the emblem is not mandatory, or required for any other advancement.

The Scouts also allow religious organizations to provide chaplains and religious observances on the weekends representing the full range of religious perspectives. Smith Decl., para. 49 (Sep. App 60). But the Scouts do not advance any particular theology of their own, nor do they engage in any religious instruction. Id., paras. 26, 28 (Sep. App. 52-53). The Scouts also do not require their members to visit the chaplains or religious observances offered by these religious organizations. Id., para. 28 (Sep. App. 53). The Boy Scout organization simply encourages members to practice their religious beliefs under the guidance of their family and spiritual advisors. Smith Decl., paras. 26, 28 (Sep. App. 52-53).

The Jamboree, therefore, is an overwhelmingly secular event focused on outdoor activities and patriotic and civic virtues. The military support provided to the Jamboree consequently advances these activities far more than it does religion, which has a proper but only tangential and incidental role in the event. Once this full context of the Jamboree is understood, there is no reasonable way that the **primary** effect of the military support for the Jamboree can be said to advance religion. Consequently, that support cannot involve an establishment of religion.

Indeed, the role of religion in the Jamboree is analogous to the role of chaplains in the military itself. Chaplains provide religious services to those in the military who desire them. The military makes these chaplains available to service members, but does not require anyone to participate in their services. Yet, those chaplains, entirely financed by the military itself, do not violate the Establishment Clause. *See, e.g., Katcoff v. Marsh*, 755 F.2d 223 (2d. Cir., 1985)(upholding military chaplain program).

The constitutionality of the military support for the Jamboree in this case is all the more clear because that support is part of a more general practice of similar support for a broad range of events and organizations. Besides 10 U.S.C. 2554, which expressly authorizes military support for the Jamboree, 10 U.S.C. 2667 authorizes the military to lease real or personal property to private groups where that would promote the national defense or be in the public interest. In addition, 10 U.S.C. 2012(a) authorizes military support to Federal, state, regional or local government entities, or private organizations, where that support would be incidental to military training. The statute refers to a dozen other youth or charitable organizations eligible for such support besides the Boy Scouts, including the Girl Scouts of America, Boys and Girls Clubs of America, YMCA, YWCA, Civil Air Patrol, U.S. Olympic Committee, Special Olympics, Campfire Boys and Campfire Girls, 4H Club, and the Police Athletic League, as well as any other entity approved by the Secretary of Defense on a case-by-case basis. *Id.* 2012(e).

Moreover, Joint Ethics Regulation, DOD 5500.7. Sect. 30211 authorizes use of DOD facilities and equipment and the services of DOD employees to support events sponsored by non-Federal organizations where that would serve DOD community relations or training interests. Individual base commanders also have authority to open their facilities to civic organizations or to the general public for recreation purposes.

Under this authority, the military has provided support for the Special Olympics, the Goodwill Games, World Cup USA, Summer Olympics, International Pan American Games, and other major sporting events. *Irizarry Decl.*, para. 2 (Sep. App. 66); DoD Statement of Facts, para.26.³ It has provided support for privately sponsored concerts, circuses and fairs, such as the Oktoberfest at Ft. Gordon in Augusta, Georgia, the Circus

Chimera at Camp Parks Army Base in Dublin, California, and performances by the rock bands Styx, REO Speedwagon, Journey, Def Leppard, and others at Ft. Carson Army Base in Colorado, Leonard Wood Army Base in Missouri, Ft. Stewart in Georgia, and Redstone Arsenal in Alabama.

A Christian Parody rock band named Apologetix has performed at Aberdeen, Maryland army base, and at Fort Benning, Georgia. The military supports about 100 events a year under Section 2012, only a few of which relate to the Boy Scouts.

Declaration of Kevin Bushey, para. 12 (Sep. App. 83).

At Fort A.P. Hill, youth organizations, clubs, individuals and schools are allowed to use the facilities year round, including 3,000 hunters and 800 anglers. The Fort property also includes Liberty Church, which housed a Baptist congregation for many years and now serves as the chapel for the Fort..

The U.S. Army also maintains close to 100 bands that perform in churches, schools, malls, and elsewhere, all over the country. The Navy Blue Angels also perform at private sector sponsored events nationwide to promote military recruiting.

The **primary** effect of this broader practice, where military support is provided to many non-religious and secular organizations and events as well as religious ones, is clearly not to benefit religion. “[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger v. Rector & Visitors of University of Virginia*. 515 U.S. 819, 839 (1995).

³ See also <http://www.gpoaccess.gov/usbudget/fy06/sheets/budauth.xls>.

C. The Relationship Between the Military and the Boy Scouts at the Jamboree Is Fundamentally a Value for Value Contract, Which Does Not Amount to an Establishment of Religion.

Fundamentally, the relationship between the military and the Boy Scouts in regard to the Jamboree is a mutually beneficial, value for value contract. The military provides, and the Scouts receive, the support to the Jamboree discussed above. In return, the military receives, and the Scouts provide, the broad range of valuable benefits discussed above.

Indeed, in regard to the Jamboree at Fort A.P. Hill, the Department of the Army and the Scouts signed a letter of understanding providing that the Scouts would make permanent improvements at the Fort and allow the military to use those facilities except during the Jamboree, with the Scouts receiving in exchange use of the facilities for its Jamboree for 10 days every four years. DOD 002085 (Sep. App, 41). It is under that agreement that the Scouts have expended \$5.6 million to \$8.4 million, for permanent improvements at Fort A.P. Hill. Irizarry Decl., para. 25 (Sep. App. 77).

The government is free to enter into mutually beneficial contracts with religious organizations without violating the Establishment Clause. *Comm. For Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *American Jewish Congress v. Corp. for Nat'l and Community Service*, 399 F. 2d 351 (D.C. Cir. 2005); *Christian Science Reading Room v. San Francisco*, 784 F.2d 1010 (9th Cir. 1986)(Government lease of real property to religious organization).

Therefore, for this reason as well, the military support provided to the Jamboree does not violate the Establishment Clause.

D. The District Court Erred in Finding that the Military’s Support for the Jamboree Violated the Establishment Clause.

The district court below made a fundamental error in its analysis of this case. It failed to conduct a basic analysis of whether the military support for the Jamboree has the primary effect of advancing religion. The analysis above shows that the primary effect of that support is to advance the interests of the military, not religion. Indeed, it advances the overwhelmingly secular outdoor activities and patriotic and civic virtues of the Jamboree far more than religion, which has only a tangential, incidental role in the Jamboree.

Instead of properly conducting this basic analysis, however, the court below misapplied the rules in various, recent precedents, leading to an erroneous conclusion that the military support for the Jamboree amounts to an unconstitutional establishment of religion.

For example, the district court held that the statute providing for military support for the Jamboree “[d]efines its recipients by reference to religion” because it “contains no particular criteria on which the aid is allocated, neutral or otherwise.” Opinion at 38 (App. 38). But, as discussed above, the criterion by which the military support is allocated is whether it will advance the interests of the military. Consequently, the military support is, in fact, “allocated on the basis of criteria that neither favor nor disfavor religion.” *Agostini*, 521 U.S. at 232.

The district court similarly erred by holding that the military’s support for the Jamboree under 10 U.S.C. 2554 is “to the exclusion of other possible recipients.” Opinion at 39 (App. 39). But the statute does not prevent the military from supporting any other event sponsored by any other group on the same terms. Other provisions of

law authorize the military to support other events and groups where that would also advance the interests of the military, and that has been done extensively, as discussed in detail above.

The district court also erroneously held that the military support for the Jamboree creates a “financial incentive to undertake religious indoctrination.” Opinion at 37 (App. 37). That would only be true if the military support was provided only because of the religious components of the Jamboree. But that could not be more wrong. There is no evidence whatsoever that the military support was provided because of the religious elements of the Jamboree. Rather, as discussed above, the record establishes that the military support was provided to advance the interests of the military, not to advance religion. Indeed, military support has been provided for many other events sponsored by other organizations that had no religious components.

Finally, the district court erroneously held that the military support for the Jamboree results in government indoctrination of religion. Opinion at 29 (App. 29). But the record shows that neither the government nor the Boy Scouts engages in such indoctrination. Again, the Boy Scouts advance no theology of their own, nor do they engage in religious instruction. Any religious instruction at the Jamboree is conducted by outside religious groups allowed to offer services at the event to accommodate scouts who wish to attend, analogously to the chaplain services offered by the military itself. But the Boy Scouts do not require their members to attend such services, nor visit any religious exhibit or earn any religious emblem. Those activities are completely up to each scout. The Boy Scout organization simply encourages members to practice their religious beliefs under the guidance of their family and spiritual advisors.

Military support for the Jamboree consequently does not involve anything remotely like government indoctrination of religion.

CONCLUSION

For the reasons stated above, this Court should vacate the injunction barring military support for the Jamboree pursuant to 10 U.S.C. 2554 and dismiss plaintiffs' Establishment Clause claims.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that according to the word count provided by Microsoft Word, the foregoing brief contains 3,347 words. The text of the brief is composed in proportional Times New Roman typeface, with 12 point type, in compliance with the type size limitations of Federal Rule of Appellate Procedure 32(a)(5)(B) and Seventh Circuit Rule 32(b).

Peter J. Ferrara

Certificate of Service

I hereby certify that on this 8th day of November, 2005, I filed the above brief of *Amicus Curiae* American Civil Rights Union in Support of Appellant by delivering 15 copies of the brief, along with a diskette containing a copy of the brief, to Federal Express for overnight delivery to the Clerk's Office of the United States Court of Appeals for the Seventh Circuit. On the same day, I also delivered two copies of the brief and one diskette containing a copy of the brief to Federal Express for overnight delivery for each of the following counsel:

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